No. 2, from the evidence, was untrue. Whether such misrepresentation was innocent or fraudulent is uncertain and immaterial. But having regard to the fact that there was no response to the demands and no disclosure until the trial of the true principal, the latter is the more probable. Any liability of the defendant (1) had been repudiated, if not before, by the pleadings. If it were true that the defendant No. 2 was merely acting as an agent of K.L. Properties Ltd. when he ordered the works to be performed, it would seem strange that he did not disclose it earlier or took any step to join the proper principal as a co-defendant under the third party procedure.

The common law rule regarding liability in such cases is to be found in section 188 of the Contracts (Malay States) Ordinance, 1950:—

"A person untruly representing himself to be the authorised agent of another and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing."

Under section 186, which is a substantive law and not merely adjectival, the third party may hold either or both the principal and agent liable for the costs incurred:—

"In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable."

Since the defendant (1) has not ratified his acts, the defendant No. 2 must be adjudged as the person liable for the costs as claimed plus the costs of the action.

In view of the conduct of defendant (1), no costs will be granted to them.

Order accordingly.

Solicitors: *Lovelace & Hastings; Chooi & Co.*

PUBLIC PROSECUTOR v. ONG KOK TAN

[F.C. (Azmi L.P., Ong Hock Thye C.J. (Malaya) & MacIntyre F.J.) January 24, 1969]

[K.L. — Federal Court Criminal Reference No. X2 of 1968]

Road Traffic — Public service vehicle — Prohibition of use of unlicensed — Insurance — Third party risks — Charge under s. 92(1) made at same time as charge under s. 74(2) of Road Traffic Ordinance, 1958 — Whether proper joinder — Road Traffic Ordinance, 1958, ss. 74(2), 92(1) & 144(a).

Evidence — Police observations on motor vehicle used as a public service vehicle without valid insurance — Admissibility of — Evidence Ordinance, 1950, s. 15.

Criminal Law and Procedure — Charge under ss. 92(1) and 74(2), Road Traffic Ordinance, 1958 — Whether proper joinder — Criminal Procedure Code (Cap. 21), s. 175.

The questions reserved for the decision of the Federal Court in this case were: (a) whether the evidence of observations obtained on a motor vehicle used as a public service vehicle without a valid licence in force, prior to the date mentioned in a charge under section 92(1) of the Road Traffic Ordinance, 1958, is admissible, and (b) whether a charge under section 92(1) made at the same time as a charge under section 74(2) of the said Ordinance though made under different parts thereof is a proper joinder.

Held: (1) the evidence of observation is relevant by virtue of section 15 of the Evidence Ordinance and may be used by the prosecution in rebuttal of the anticipated defence. As material and relevant evidence it could be used both in support of the presumption under section 144(a) of the Road Traffic Ordinance and to corroborate evidence of payment by a witness for the prosecution. Evidence of observations thus used in conjunction with the presumption, or with oral evidence of payment of fares, strengthens considerably the case for the prosecution by rebutting any possible defence. Therefore the answer to the first question should be in the affirmative;

(2) in considerng whether to allow joinder or not, the paramount consideration would be that any order whether allowing or refusing a joinder should only be made after consideration of whether such order would prejudice or embarass the defence. In this case the defence was never in the least prejudiced. Therefore the answer to the second question should also be in the affirmative.

Cases referred to:—

(1) *Ali bin Hassan* v. *Public Prosecutor* [1967] 2 M.L.J. 76.

(2) *Gan Chye Huat* v. *Public Prosecutor* [1962] M.L.J. 27.

(3) *Abdul Hamid* v. *Public Prosecutor* [1962] M.L.J. 44.

(4) *Public Prosecutor* v. *Ong Hock Thuan* [1963] M.L.J. 10.

(5) *Darus* v. *Public Prosecutor* [1964] M.L.J. 146.

(6) *Maidin Pitchay & Anor.* v. *Public Prosecutor* [1968] 1 M.L.J. 82.

(7) *Gun Kim Luu* v. *Public Prosecutor* [1961] M.L.J. 35.

(8) *Public Prosecutor* v. *Leong Kow Chai* [1968] 2 M.L.J. 29.

(9) *Public Prosecutor* v. *Mohamed Yunus* (unreported, 1960) Kuala Lumpur Criminal Appeal No. 65 of 1960.

(10) *Public Prosecutor* v. *Ooi Seng Huat* [1968] 2 M.L.J. 168.

(11) *Makin* v. *Attorney-General of New South Wales* [1894] A.C. 57 at 65.

(12) *Connelly* v. *Director of Public Prosecutor* [1964] 2 All E.R. 401.

(13) *R.* v. *Jones* [1918] 1 K.B. 416.

FEDERAL COURT.

K. Somasundram (Senior Federal Counsel) for the applicant.

K. d'Cruz for the respondent.

Cur. Adv. Vult.

Azmi L.P.: The High Court at Malacca on the application of the Public Prosecutor reserved

for the decision of this court the following questions of law:—

(1) whether the evidence of observations obtained on a motor vehicle used as a public service vehicle without a valid licence in force, prior to the date mentioned in a charge under section 92(1) of the Road Traffic Ordinance, 1958, is admissible.

(2) whether a charge under section 92(1) made at the same time as a charge under section 74(2) of the said Ordinance though made under different parts thereof is a proper joinder.

The driver of the motor car, respondent in this reference, had been convicted by the court of a magistrate on two charges, under section 92(1) and section 74(2) respectively, and sentenced on the first charge to pay a fine of $500 or in default 3 months' imprisonment and on the second charge to pay a fine of $100 or in default 3 weeks' imprisonment.

The prosecution case showed that the said vehicle was licensed only as a private passenger vehicle and its insurance policy consequently was one not for the carriage of passengers for hire or reward. Evidence of observation of the movements of the said car had been given. Two policemen stated that for two days they kept watch of its movements when driven by the respondent between two villages in the area, on each occasion carrying an assortment of passengers. On the first day the vehicle made three trips between Masjid Tanah and Leboh Melayu and on the second day six trips. In all it carried 50 passengers. On 3rd May 1967 the two policemen were instructed to detain the driver. They did so while it was proceeding from Masjid Tanah to Leboh Melayu with three passengers.

At the close of the prosecution the learned magistrate called for the defence on both charges. The gist of the respondent's evidence was that he was a man of property with a comfortable income. Because of the non-existence of a bus service between the two villages in the area he was in the habit of giving lifts to persons who asked for them but for which he never charged any fares or took any reward. He also denied that he on the two days mentioned had made so many trips as alleged. In reference to the events of 3rd May 1967 he said that the three passengers were his old friends none of whom paid any fare for the trip. Two of them gave evidence for the defence in corroboration, while as to the third one, it was necessary for the prosecution to produce her previous statement taken by the police in the course of investigation which contradicted her evidence in court.

In the result, the learned magistrate found the respondent guilty, but dealt merely with the facts of the case without making any reference to the presumption under section 144 of the Road Traffic Ordinance.

Against this conviction the respondent appealed to the High Court on several grounds. One of them was against the joinder of the two charges which was, however, abandoned at the hearing of the appeal. Another ground questioned the admissibility of the evidence of observation made by the two policemen. Before the learned judge, counsel for the respondent cited only *Ali bin Hassan* v. *Public Prosecutor.*[1] The learned deputy public prosecutor, on the other hand referred the court to:—

(1) *Gan Chye Huat* v. *Public Prosecutor.*[2]

(2) *Abdul Hamid* v. *Public Prosecutor.*[3]

(3) *Public Prosecutor* v. *Ong Hock Thuan.*[4]

(4) *Darus* v. *Public Prosecutor.*[5]

(5) *Mydin Pitchay & Anor.* v. *Public Prosecutor.*[6]

On the question of misjoinder he cited:—

(1) *Gun Kim Luu* v. *Public Prosecutor.*[7]

(2) *Public Prosecutor* v. *Ong Hock Thuan.*[4]

(3) *Darus* v. *Public Prosecutor.*[5]

(4) *Public Prosecutor* v. *Leong Kow Chai.*[8]

The learned judge dismissed the appeal, merely stating that he agreed with the view expressed in *Leong Kow Chai* and that the two charges arose out of the same transaction. With reference to the observation evidence his view was that it was admissible under section 15 of the Evidence Ordinance, being the sort of evidence which was required to prepare the groundwork for the presumption under section 144(a) of the Road Traffic Ordinance. In other words, he adopted the views expressed by Ong Hock Thye J. (as he then was) in *Darus* v. *Public Prosecutor.*

On the application of the Public Prosecutor, the learned judge referred the two questions above set out for our determination.

We shall deal first with the question whether the observation evidence was admissible or, to use the more appropriate word, "relevant" to the issue in the case. This point has been canvassed in the several judgments cited above, but except that of *Ali bin Hassan,* all took the view that such evidence is relevant. We propose now to refer to some of them.

Adams J. in *Abdul Hamid,* having stated that such evidence is admissible, went on to say that it should be produced in all cases of this nature. Ong Hock Thye J., in *Gan Chye Huat,* not only was of the view that such evidence is relevant, but considered it essential that it should be given before the presumption in paragraph (a) of section 144 of the Road Traffic Ordinance should be invoked. What he said was:—

"In these circumstances the presumption under section 144(a) could not have arisen since there was not the remotest excuse for resorting to it. There must at all times be adequate groundwork before applying the presumption, otherwise every private vehicle-owner will be presumptively guilty of an offence under section 92(1) every time he carries in his car any passenger not related to him."

Whilst on this point it may be noted that Ong Hock Thye J. in a previous judgment in *Public Prosecutor* v. *Mohamed Yunus* [9] had not considered any such evidence of groundwork necessary. This is what he said in that judgment:—

"I would emphasise that a presumption is a rule of law that courts and judges shall draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved. Section 144(a) provides that 'in so far as it may be necessary to establish the offence charged it shall be presumed until the contrary is proved that any conveyance of persons or goods in a motor vehicle was for hire or reward'. Evidence that a vehicle licensed for private use only was carrying passengers or goods is sufficient to raise the presumption which the persons charged must rebut. The learned magistrate is not at liberty to brush off an express provision in an Act of Parliament as not bindng on him."

In *Public Prosecutor* v. *Ong Hock Thuan* this question was subsequently considered by Azmi J. and he expressed agreement with Ong Hock Thye J. in the above statement of the law but not with his view on the same point in *Gan Chye Huat*. Chang Min Tat J. in *Public Prosecutor* v. *Ooi Seng Huat* [10] appeared to agree with him and said so in these terms:—

"In view of the innumerable permutations in the use of any car, I am unable to agree that the observation must be continuous to raise the presumptions under section 144 of the Road Traffic Ordinance. Now as a matter of law the presumption is a statutory invention that upon proof of a fact an inferencec of another fact can be drawn. In the circumstances of a pirate taxi charge, the presumptions under section 144(a) and (b) are that any conveyance of persons in a motor vehicle was for hire or reward and that the passengers were carried in consideration of separate payments made by them. There is nothing in section 144 which refers to groundwork observation. There is as I see it no strict legal necessity for the groundwork observation except perhaps as stated by Ong Hock Thye J. (as he then was) that such observation was evidence permitted under section 15 of the Evidence Ordinance to prove and here I quote 'that the meetings were not accidental and that it was the appellant's regular practice to pick up passengers.' It seems to me too that, while this groundwork observation is strictly not necessary and only anticipatory of any defence, it goes a long way to mitigating the harshness of the law if applied strictly by the police stopping any and every car in which passengers are being carried and relying on the presumption hailing the driver to the court."

To return to the question whether evidence of observation is relevant or not, we have considered all the relevant judgments on this question and are of opinion that such evidence is relevant by virtue of section 15 of the Evidence Ordinance and may be used by the prosecution in rebuttal of the anticipated defence. As material and relevant evidence it could be used both in support of the presumption under section 144(a) and to corroborate evidence of payment by a witness for the prosecution. Evidence of observation thus used in conjunction with the presumption, or with oral evidence of payment of fares, strengthens considerably the case for the prosecution by rebutting any possible defence. In our view therefore the answer to the first question should be in the affirmative.

We are fortified in our view by the following judgment of the Privy Council in *Makin* v. *Attorney-General of New South Wales.* [11]

"In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."

The principles laid down in the above passage are embodied in section 15 of our Evidence Ordinance.

Turning to the second question as to joinder of the two charges, section 175 of the Straits Settlements Criminal Procedure Code, which applies to the State of Malacca, corresponding to section 164 of the Criminal Procedure Code of the Malay States, provides as follows:—

"175(1) If in one series of acts so connected together as to form the same transaction more offences than one are committed by the some person, he may be charged with and tried at one trial for every such offence.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with and tried at one trial for each of such offences."

The question whether two or more charges (but not more than three) may be tried in one trial or not is a matter of discretion of the trial court, to be exercised with due regard to the facts of each case. In our view, one of the factors a trial court should bear in mind in exercising its discretion as to whether or not to allow the joinder of two or more charges in one trial, is that it shall not result in such oppression towards the conduct of the defence as to occasion a miscarriage of justice. In the present case, it may be said that some confusion had arisen in the minds of both the courts below by failing to advert to the fact that the presumption under section 144(a) of the Road Traffic Ordinance applies only to the first charge and not to the second. This confusion perhaps arose more

from failure to remember the distinction than from the facts of the case. The facts are simple enough.

In this connection we would refer to the views expressed by the House of Lords in *Connelly* v. *Director of Public Prosecutions.*[12] The facts of that case are that, arising out of an armed robbery, two indictments were preferred against the appellant, the first charging him with murder and the second charging him with robbery. Because of the rule of practice enunciated in *R.* v. *Jones*[13] it was not permissible to include both charges in one indictment and the two indictments could not be tried together. At the trial of the first indictment for murder the appellant was found guilty but, the conviction was set aside by the Court of Criminal Appeal on the ground of misdirection.

The court subsequently gave leave to proceed with the second indictment. When that indictment came on for trial the trial judge directed the jury to reject a plea of *autrefois acquit* but indicated that, if he had a discretion, he would have stayed the second indictment on the ground that it involved a retrial of the issue of identity decided in the appellant's favour on the first indictment. The trial later proceeded before a different judge who also rejected a plea of *autrefois acquit.* Appellant was convicted and his appeal finally came before the House of Lords which dismissed the appeal.

Lord Reid (after referring to the practice based on *R.* v. *Jones, supra*) stated:—

"I think the present practice is inconvenient and ought to be changed. I realise that there are cases where for one reason or another it would be unfair to the accused to combine certain charges in one indictment. So the general rule must be that the prosecutor should combine in one indictment all charges which he intends to prefer; but in a case where it would have been improper to combine the charges in that way, or where the accused has accepted without demur the prosecutor's failure so to combine the charges, a second indictment is allowable. That will avoid any general question as to the extent of the discretion of the court to prevent a trial from taking place; but I think that there must always be a residual discretion to prevent anything which savours of abuse of process."

Lord Morris of Borth-y-Gest at page 409 has this to say:—

"It is however, clear that in framing two indictments against the appellant in the present case, the prosecution were not at fault and were only doing what they were obliged to do. While as I will endeavour to show, there has never been a rule that some facts may not form a basis of successive charges, there is inherent in our criminal administration policy and tradition that even in a case of wrongdoers there must be an avoidance of anything that savours of oppression."

I now quote the headnote:—

"The court has discretion (outside the strict limits of a plea of *autrefois* acquit or *autrefois* convict) to stay, and in general should stay, a subsequent indictment containing charges founded on the same facts as those on which a previous indictment is based on one incident. The general rule, accordingly must be that charges which may be joined in an indictment in accordance with r. 3 of Schedule 1 to the Indictments Act, 1915 should be so joined, but the court retains a discretion in special circumstances not to apply the general rule thus ensuring that there is no abuse of its process; the exceptional rule of practice, whereby no other count should be joined in an indictment with a count for murder or manslaughter (see *R.* v. *Jones* [1918] 1 K.B. 416 and *R.* v. *Large* [1939] 1 All E.R. 753) should no longer have effect as a rigid rule to be applied irrespective of prejudice or embarrassment to the defence, the defendant being able to apply for separate trials if he so wishes."

It is clear from this judgment of the House of Lords that in considering whether to allow joinder or not, the paramount consideration would be that any order whether allowing or refusing a joinder should only be made after consideration of whether such order would prejudice or embarrass the defence.

In our judgment the defence in the case under reference was never in the least prejudiced. We therefore answer the second question also in the affirmative.

Questions answered in the affirmative.

Solicitors: *Shearn, Delamore & Co.*

SIAH IK KOW v. PUBLIC PROSECUTOR

[F.C. (Ong Hock Thye C.J. (Malaya), Gill F.J. and Pawan Ahmad J.) January 27, 1969]

[Ipoh — Federal Court Reference No. X4 of 1968]

Road Traffic — Goods carried for the purpose of trade or business — Presumption — Whether available — Road Traffic Ordinance, 1958, ss. 74(1), 98(1) and 144(a).

Evidence — Fact discovered in consequence of information — Evidence Ordinance, 1950, s. 27 — Criminal Procedure Code (Cap. 6), s. 113(i).

The applicant was convicted on two charges of offences under sections 74(1) and 98(1) of the Road Traffic Ordinance, 1958. It was alleged that he was carrying goods for the purpose of trade or business without a haulage permit and that the use of the vehicle for such purpose was not covered by third-party insurance. At the trial evidence was admitted of a statement by the applicant to one of the police constables who stopped him that the cucumber which was carried by him in the car weighed 90 katties. The appeal of the applicant against his conviction was dismissed in the High Court but the following question of law was reserved for the decision of the Federal Court:— "Whether in a charge under section 98(1) of the Road Traffic Ordinance, 1958 having regard to the principles of law relating to the onus of proof resting upon the prosecution, the presumption contained in section 144(a) of the Road Traffic Ordinance, 1958, is available to the prosecution for establishing that the goods were carried for the purpose of trade or business and so as to raise a *prima facie* case against the person charged with an offence of that nature." Section 144(a) of the Ordinance provides that in any proceedings for an offence under Part V of the Ordinance in so far as it may be necessary to establish the offence charged it shall be presumed until the contrary is proved that any conveyance of persons or goods in a motor vehicle was for hire or reward.